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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 283

ROSEMARY CROSS,
Petitioner,

v.

ILSE KILIANI,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This brief is respectfully submitted in opposition to the petition filed by the petitioner herein for writ of certiorari to review the final order of the Court of Appeals of the State of New York, entered on May 26, 1949, dismissing an appeal by the petitioner from a final order of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered on March 21, 1949, dismissing an appeal from an order of the Supreme Court of the State of New York, Westchester County, entered on February 16, 1949.

The petitioner describes the aforesaid order of the Supreme Court, Westchester County as "final". It is respectfully submitted that petitioner misconceived the nature of said order; it is not "final", but intermediate. No trial has been had of the petitioner under the information filed by the respondent, and the order of the Supreme Court, Westchester County, referred to, merely denied the application of the petitioner that the proceedings be presented to the Grand Jury. The appeals by the petitioner first to the Appellate Division and then to the Court of Appeals, were each dismissed because in the State of New York, no appeal lies from an intermediate order in a criminal action but only from judgment of conviction or final orders.

Jurisdiction

The petitioner invokes the jurisdiction of the Court under Section 237 of the Judicial Code, as amended, and cites it as 38 U. S. C. A., § 344. This, of course, is the old Section of the Code which formerly regulated the rights and procedure for a writ of certiorari. We assume that under the revision, effective September 1, 1948, the petitioner invokes 28 U. S. C. A. §§ 1257, 2101.

Statement of Facts

The respondent was employed by Roger H. Thiele, for over five years as nurse to the children of himself and Mrs. Thiele (p. 14).* At the time of the alleged assault on November 23, 1948, one of the children was aged six and the other child was aged one. Prior to November 23, 1948, and on January 12, 1948, Mrs. Thiele had abandoned Mr.

*Reference to page numbers in parenthesis, are to page numbers of the papers on appeal filed in the Court of Appeals, and the papers submitted to the Court of Appeals on the motion to dismiss the appeal.

Thiele, leaving the children with him, and respondent since that time had been taking care of them for Mr. Thiele (p. 14).

On November 23, 1948, both children were home ill with colds and under the care of a doctor. After obtaining entrance to the house, through an intermediary's stratagem, the respondent was assaulted by the petitioner, who rushed into the house accompanied by Mrs. Thiele, Mrs. Thiele's mother and two men. Although the respondent protested and told the petitioner and the others that the children were sick and should not be taken out of the house, the children were snatched from their beds and taken out into waiting cars. The respondent was violently pulled by the petitioner and held and bruised while the children were being removed from the premises (p. 14).

On November 24, 1948, respondent filed a complaint with Patrick J. Powers, Police Justice in the Village of North Tarrytown, County of Westchester, State of New York, charging the petitioner with assault in the third degree (p. 13). Assault in the third degree, under the Penal Law of the State of New York, is a misdemeanor (§§ 245, 2, 2181, 2182, Penal Law).

On December 4, 1948, the petitioner appeared in Court, accompanied by her attorneys and requested an adjournment. Judge Powers granted the adjournment until December 18, 1948 (p. 18). Upon the return date, petitioner again requested an adjournment so that her attorneys might secure a deposition from Mrs. Thiele, who, in the meantime, had fled to the Barbados, British West Indies, with the children. Judge Powers again granted the adjournment and the matter was put over to January 8, 1949.

On January 8, 1949, the respondent was ill and unable to attend Court and the case was adjourned until January 22, 1949.

On January 22, 1949, Judge Powers informed the petitioner of her rights under §§ 6, 57 and 58 of the Code of

Criminal Procedure, under which the application to the Supreme Court, Westchester County, was later made, and an adjournment was granted by Judge Powers until February 15, 1949 for the purpose of making the application (pp. 18-19).

On January 28, 1949, an application was made to the Supreme Court, Westchester County for an order granting a certificate that the charge against the petitioner be prosecuted by indictment (p. 13). The application was supported by various contentions (p. 7). The application came before Mr. Justice James W. Bailey, at Special Term, Part I, in the Supreme Court, Westchester County, and Mr. Justice Bailey in an opinion which carefully discussed the facts and contentions of the petitioner, denied the application (p. 20). An order was entered denying the application (p. 3).

Thereafter, the petitioner filed a notice of appeal in the Appellate Division of the Supreme Court, Second Department from the order of Mr. Justice Bailey (p. 2). The appeal was argued before the Appellate Division, Second Department and the Appellate Division held that the order was not appealable and dismissed the appeal. The determination of the Appellate Division was based on the case of *People* v. *LeTang*, 273 App. Div. 811, and case cited therein (p. 27). The case cited by the Appellate Division was *People* v. *Mascola*, 174 App. Div. 360.

In that case, the defendant was charged with a violation of the Liquor Tax Law, a misdemeanor. He moved for a certificate that the charge should be prosecuted by indictment and the application was denied. The Court dismissed the appeal on the ground that the order denying the application was not appealable, stating in part as follows (at 361, 362):

> "The law cited, pursuant to which the application was made, does not provide for the entry of an order

denying the application. It contains no provision for appeal except that a defendant may appeal from a judgment or determination of the Court of Special Sessions in the same manner as an appeal may be taken from a judgment in an action prosecuted by an indictment, and it is prescribed that the jurisdiction of appellate courts shall be the same as from such a judgment of conviction after indictment. (Laws of 1910, chap. 659, § 40.) * * * Now it is settled that unless an appeal in a criminal case is authorized by statute it is not authorized at all. (People v. Zerillo, supra; People v. Grout, No. 1, supra; Matter of Montgomery, 126 App. Div. 72; appeal dismissed, 193 N. Y. 659.)

Recantation is imperative. An intermediate appeal may not be taken, and this appeal must be dismissed."

An order was entered in the Appellate Division, Second Department, dismissing the appeal (p. 25). The petitioner filed a notice of appeal to the Court of Appeals from the order of the Appellate Division. The notice of appeal expressly stated that it was taken "as of right" (p. 23). The respondent moved to dismiss the appeal on the ground that it had not been taken by permission and could not be taken as of right and that the right of appeal in criminal cases is purely statutory and is not a constitutional right (p. 28). Upon argument in the Court of Appeals, upon respondent's motion, the Court of Appeals granted the motion and dismissed the appeal (p. 42).

Respondent Denies Prejudice by Trial Judge

The petitioner claims that the trial judge has already pre-judged both the law and the facts. The respondent denies that the trial judge made any statement in any form or manner whatsoever prejudicial to the petitioner, and that Judge Powers definitely did not make any state-

ment that he knew the respondent was the victim of an assault.

The petitioner makes the claim that there was no denial in the papers submitted to the State Supreme Court Justice. The respondent wishes to point out to the Court, that an affidavit was submitted to the State Supreme Court containing statements denying that the trial judge had prejudged the law and the facts of the case. The affidavit of respondent containing said statements, is set forth on page 16. Respondent states therein, "The applicant then makes the startling charge that she cannot obtain a fair and impartial trial before Judge Powers. It is my belief that Judge Powers has not formed any judgment on this case. As a matter of fact, it was he who, as the applicant states, informed the applicant of her rights under Sections 57 and 58 of the Code of Criminal Procedure. * * *"

A further denial was contained in the affidavit of J. Robert Bleakley, sworn to the 29th day of April, 1949, which affidavit is set forth in the papers on appeal filed in the Court of Appeals by respondent on the motion to dismiss the appeal. The affidavit is set forth on page 40 in the folder containing the papers filed in the Court of Appeals on said motion. The affidavit of J. Robert Bleakley contained the statement, "That your deponent was present in the Court Room in the Village of Tarrytown at the time the statement was alleged to have been made by the Hon. Patrick J. Powers, and states that following the granting of an adjournment in this matter, the attorney for the appellant called upon his own stenographer seated in the middle of the Court Room to arise and attempt to read back, verbatim, the statements of Judge Powers. That your deponent states that no statement was ever made by Judge Powers that he believed that the complainant was the victim of an assault. * * *"

The respondent points out to the Court the fact that, not only have numerous adjournments been granted to the

petitioner herein to carry through the appeals, but further that the petitioner herein was not required by Judge Powers to obtain a stay in order to bring the petition for the writ of certiorari. That respondent wishes to point out to the Court that the charge was filed on November 24, 1948, and that approximately *one year* will have elapsed before this matter is brought to trial. The numerous adjournments granted by Judge Powers certainly does not evince any prejudice toward petitioner.

Questions Alleged to be Presented for Review

On page 2 of the petition of the petitioner, two questions are claimed to be presented for review by this Court. Under analysis it is clear that these questions are so framed by the petitioner that they present statements of a fact situation which do not, in truth, exist. Thus the first question assumes as a "fact" that the trial judge has already pre-judged both the law and the fact. The fact is that this is not the case as our foregoing statement clearly shows. Moreover, such question assumes that petitioner has, by the proceedings in the Courts of New York State, been compelled to submit to a trial. The fact is otherwise. All that petitioner has so far attempted to do, is to have her case presented to the Grand Jury. There has been no trial, and upon the trial, or by proper proceedings prior to the trial, the petitioner can adequately protect her rights, if any exist.

The second question attempts to imply that the Law of the State of New York cited by the petitioner, "forbids" petitioner an appeal on constitutional grounds. That is not the fact. The law of New York does not forbid an appeal; it merely does not provide for an appeal from an intermediate order of the character which petitioner sought to obtain in the Courts of New York. We shall, however, demonstrate at a point beyond, that there is no constitutional right to appeal from an intermediate order in a criminal action.

Reasons Why the Writ Should Not be Granted

First: There is no constitutional right to an appeal from an intermediate order in a criminal action. It has been held many times that the right of review in criminal cases by an Appellate Court is not an element of due process. *District of Columbia* v. *Clawans,* 300 U. S. 617; *Errington* v. *Hudspeth,* 104 F. (2d) 384, cert. den. 310 U. S. 638; *Applebam* v. *United States,* 274 F. 43, cert. den. 256 U. S. 704; *U. S. ex rel. Mason* v. *Hunt,* 16 Fed. Supp. 285.

The right of review under Federal Law as in New York Law is entirely dependent upon statute. The right of review is not a natural, inherent or fixed right, but may be granted or withheld by the legislature in its wisdom. *People* v. *Gersewitz,* 294 N. Y. 163, 326 U. S. 687; *People* v. *Zerillo,* 200 N. Y. 443; *McKane* v. *Durston,* 153 U. S. 684.

In *McKane* v. *Durston,* this Court said (at 687):

> "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case * * * was not at common law and is not now a necessary element of due process of law."

Here there is not even a *final* judgment involved, but merely an intermediate order in the action. In *People* v. *Gersewitz, supra,* a motion was made to the Court in which a conviction was had to vacate its own judgment and to discharge the defendant from custody thereunder or to grant a new trial. The defendant invoked the power of the Court upon the ground that his constitutional right had been infringed. The Court denied the application and the defendant took an appeal. An appeal to the Appellate Division from the order of the lower court denying the application was made, but was dismissed by the Appellate

Division. The defendant then appealed to the Court of Appeals from this decision and in a clear and positive opinion by Chief Judge Lehman, the Court of Appeals unanimously affirmed the Appellate Division. In part, Chief Judge Lehman said (at 168-169):

> "By motion to the court, in which a conviction was had, to vacate its own judgment and to discharge a defendant from custody thereunder or to grant a new trial, the defendant invokes the power of the court to vindicate the defendant's constitutional rights in the criminal prosecution. Such a motion is not a 'special proceeding' as defined by the Civil Practice Act but is made in the criminal action, and an order made upon such a motion is an 'intermediate order' from which an appeal may be taken only if a right to review of the order is established by the Code of Criminal Procedure. Argument that the omission of the Legislature to provide for an appeal from such an order was inadvertent and that the omission should be supplied may be persuasive; but such arguments must be addressed to the Legislature. The court has not power to supply even an inadvertent omission of the Legislature."

We respectfully submit that this opinion of the Court of Appeals affirmed by this Court, is the complete answer to the contentions of the defendant.

Second: The law in New York is thoroughly settled that an order denying a defendant's application for a certificate that the defendant be tried by indictment is not appealable. Cases supporting this proposition are many and clear in point. *People* v. *LeTang,* 273 App. Div. 811; *People* v. *Warner,* 232 App. Div. 843; *People* v. *Mascola,* 174 App. Div. 360; *People* v. *Sanger,* 168 App. Div. 135; *People* v. *Heckart,* 20 N. Y. S. 2d, 988 (not officially reported).

Third: The petitioner is amply protected by the right of review from any judgment of conviction.

The petitioner entirely overlooks the right vouchsafed to her to appeal from any judgment of conviction which might be rendered against her upon a trial. The New York statutes clearly grant an appeal to the petitioner in such an event and at that time any ground that she may urge for reversal by reason of the actions of the trial court may be at length considered by an Appellate Court. Consequently, there is no point to her contention that her rights will be irrevocably lost unless review is granted by this Court.

We, of course, do not in this brief, attempt to set forth the many considerations of policy which might be submitted on behalf of the determination of the Legislature of the State of New York that, in general, intermediate orders in a criminal case should not be subject to an appeal. It is enough, we believe, to indicate that petitioner's constitutional rights have not been invaded, and are, indeed, protected by the existing procedure under New York Law.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Of Counsel, Attorneys for Respondent.